

**DEPARTMENT OF STATE REVENUE  
SUPPLEMENTAL LETTER OF FINDINGS: 03-0248  
Indiana Corporate Income Tax  
For the Tax Years 1997 to 2000**

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**ISSUE**

**I. Money Received in an Agency Capacity – Gross Income Tax.**

**Authority:** IC 6-2.1-2-2(a)(1); IC 6-2.1-2-2(a)(2); 45 IAC 1.1-1-2; 45 IAC 1.1-6-10; Criterion Catalyst, Co. v. Dept. of State Revenue, No. 49T10-9612-TA-00180 (Ind. Tax Ct., Feb. 2, 1999); Ind. Tax Ct. R. 17.

Taxpayer – on behalf of taxpayer operating company – argues that it is not subject to Indiana gross income tax on money it received while purportedly acting in an agency capacity. According to taxpayer, by rendering an unfavorable opinion in the original Letter of Findings, the Department simply compounded that original, erroneous determination.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state company which filed consolidated Indiana tax returns. One particular return included an operating company which was in the business of running an Indiana riverboat casino. The operating company is hereinafter referred to as “taxpayer operating company.” Taxpayer operating company did not own the casino; it managed the day-to-day operations of the Indiana casino on behalf of the casino owner.

The Department of Revenue (Department) conducted an audit review of taxpayer's business records and tax returns. The Department concluded that taxpayer operating company had received money from the casino owner which was subject to gross income tax. Taxpayer disagreed with this conclusion arguing that the money was received from the casino owner while taxpayer operating company was acting in an agency capacity. According to taxpayer operating company, it was not subject to gross income tax on these amounts because it received the money while acting as an agent and because taxpayer operating company was simply being reimbursed – on a dollar-for-dollar basis – for the money it had paid to the casino's employees.

Taxpayer (on behalf of itself and taxpayer operating company) submitted a protest challenging the audit's determination that the money was subject to Indiana gross income tax. An administrative hearing was conducted during which taxpayer explained the basis for its protest. A Letter of Findings (LOF) was issued in response to the protest with the Department concluding that taxpayer operating company was not acting as an agent and that the money was indeed

subject to gross income tax. Taxpayer was not satisfied with the conclusions arrived at or the explanation provided in the LOF. Taxpayer requested a rehearing asking that the Department revisit the agency issue. The request for rehearing was granted and, based upon taxpayer's written presentation, this Supplemental Letter of Findings (SLOF) results.

## **DISCUSSION**

### **I. Money Received in an Agency Capacity – Gross Income Tax.**

Casino owner and taxpayer operating company entered into a "Project Development and Management Agreement" (Agreement) whereby taxpayer operating company arranged for the construction of the casino and agreed to subsequently provide for the day-to-day operation of the casino once construction was completed. Taxpayer operating company assisted in obtaining the casino license, but casino owner was the entity which actually held the casino's license.

Under the terms of the parties' Agreement, taxpayer operating company had the responsibility to recruit and train the casino staff members, create and implement a casino marketing program, obtain the casino license on behalf of the owner, acquire the necessary start-up supplies and equipment, and develop start-up and operating budgets.

Under the terms of the Agreement, the casino owner designated taxpayer operating company as the casino owner's "exclusive agent, to supervise, manage, direct and operate the [casino] during the Terms of this Agreement." Taxpayer operating company was granted "all the prerogatives normally accorded to management in the ordinary course of commerce, including . . . the collection of receivables, the incurring of trade debts, the approval and payment of checks, the advance of credit and the negotiating and signing of operational leases and contracts." In addition, the Agreement stipulated that "Unless this Agreement expressly provides for an item or service to be at [taxpayer operating company's] own expense, all costs and expenses incurred by [taxpayer holding company] . . . in the performance of [taxpayer operating company's] obligations under this Agreement shall be for and on behalf of [casino owner]." The Agreement specifically provides that, "All debts and liabilities incurred to third parties by [taxpayer operating company] on behalf of either the [casino] Owner or the Project are and shall remain the sole obligation of [casino] Owner."

In terms of the people who worked at the casino, taxpayer operating company was granted "sole authority to hire, promote, discharge, and supervise all personnel." With the exception of the casino manager, department managers, credit manager, and chief financial officer, all the casino employees were designated as employees of the casino owner. All of the costs related to the casino owner's employees were designated as an "Operating Expense of the Project and reimbursed to [taxpayer operating company] on a current basis."

After the Agreement was signed, casino owner began to pay taxpayer operating company money in the form of "management fees" in addition to money which taxpayer operating company characterized as reimbursement for expenses representing the payments advanced by taxpayer operating company to the casino owner's employees. Taxpayer operating company correctly included the "management fees" in the gross income tax base as originally filed. However, what

still remains at issue is the amount of money which taxpayer operating company received from casino owner which was used to pay the casino employees. Taxpayer operating company contends that this money is not subject to gross income tax because it was received while it was acting in an agency capacity. According to taxpayer operating company, "it was under the control of the [casino owner]," it did not "have any right, title or interest in the money or property received from the transaction," but that the money "passed through to third parties." In sum, taxpayer operating company "was merely the agent through which the funds passed to the third parties."

Indiana imposes a gross income tax upon the entire gross receipts of a taxpayer who is a resident or domiciliary of Indiana. IC 6-2.1-2-2(a)(1). For the taxpayer who is not a resident or domiciliary of Indiana, the tax is imposed on the gross receipts which are derived from business activities conducted within the state. IC 6-2.1-2-2(a)(2). However, 45 IAC 1.1-6-10 exempts that portion of a taxpayer's income which the taxpayer receives when acting in an agency capacity. 45 IAC 1.1-1-2 defines an "agent" as follows:

(a) "Agent" means a person or entity authorized by another to transact business on its behalf.

(b) A taxpayer will qualify as an agent if it meets both of the following requirements:

(1) The taxpayer must be under the control of another. An agency relationship is not established unless the taxpayer is under the control of another in transacting business on its behalf. The relationship must be intended by both parties and may be established by contract or implied from the conduct of the parties. The representation of one (1) party that it is the agent of another party without the manifestation of consent and control by the alleged principal is insufficient to establish an agency relationship.

(2) The taxpayer must not have any right, title, or interest in the money or property received from the transaction. The income must pass through, actually or substantively, to the principal or a third party, with the taxpayer being merely a conduit through which the funds pass between a third party and the principal.

The original LOF found that, "[N]either the parties' Agreement nor the parties' business practices indicate that taxpayer operating company was acting as a 'true agent' sufficient to warrant finding that the income was not subject to Indiana's gross income tax." The LOF did so finding that the casino owner did not exercise the degree of authority over taxpayer operating company characteristic of an agent/principal business relationship but that taxpayer operating company retained total operational control over the means and the manner in which the casino was operated. In addition, the LOF concluded that the taxpayer operating company failed to establish that it was merely acting as a conduit for the money which was eventually paid to the employees. Instead, the LOF found that taxpayer operating company had a direct, beneficial interest in the money it received from the casino owner.

In its request for rehearing, taxpayer maintained that the Department ignored the findings of the Indiana Tax Court in Criterion Catalyst, Co. v. Dept. of State Revenue, No. 49T10-9612-TA-00180 (Ind. Tax Ct., Feb. 2, 1999). In reviewing taxpayer's argument, the Department will set aside questions regarding the appropriateness of citing to an unpublished decision. *See* Ind. Tax Ct. R. 17 ("Unless specifically designated 'For Publication,' such written memorandum decisions shall not be published and shall not be regarded as precedent nor cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case."). In the Criterion Catalyst case, Criterion was the sole general partner of a limited partnership. Under the terms of the parties' partnership agreement, the workers at the limited partnership's plant were designated as employees of Criterion. Criterion paid the employees' salaries. However, the limited partnership reimbursed Criterion for the amount of money paid to the employees. The Department assessed Criterion gross income tax on this amount of money. The Tax Court held that Criterion was acting as the general agent for the limited partnership, that the employees worked for the limited partnership, and that the reimbursements were intended to restore Criterion to the same position it held before it advanced the wages.

The Tax Court found that the reimbursement payments made to Criterion were not subject to gross income tax because the payments merely restored Criterion to the same position it occupied before it paid the employees. In addition, the court found that "no direct benefit inure[d] to Criterion Catalyst as a result of the labor of the [employees]." The court concluded that "Criterion Catalyst, as [limited partner's] agent is merely making payments to third parties for which Criterion is reimbursed."

Taxpayer operating company argues that it occupies the same position as that of Criterion and that it is being reimbursed on a dollar-for-dollar basis for the money it pays to the casino employees. The Department does not quarrel with taxpayer operating company's arithmetic but is unable to agree that taxpayer operating company has the same agency status as that occupied by Criterion. Criterion was acting as a disinterested intermediary between the limited partner's employees and the employees. Criterion had no direct interest in what the limited partner's employees were doing because Criterion did not benefit in the work performed by the limited partner's employees. In contrast, taxpayer operating company has a direct and immediate interest in the work performed by the casino employees who – for all intents and purposes – work for and are responsible to taxpayer operating company. Taxpayer operating company is in the business of running a riverboat casino. It was responsible for the design, construction, staffing, and start-up of the casino. After the initial start-up, taxpayer operating company retained complete responsibility for all aspects of the casino's day-to-day operation. Taxpayer operating company was granted the "the absolute discretion and authority to determine operating policies and procedures, standards of operation, credit policies, complimentary policies, win payment arrangements, standards of service and maintenance, food and beverage quality and service, pricing, and other standards affecting the [casino], or the operation thereof, to implement all such policies and procedures, and to perform any act on behalf of [casino owner] which [taxpayer operating company] deems necessary or desirable for the operation and maintenance of the [casino] . . . ."

Taxpayer operating company casts itself in the role of a simple paymaster handing out monthly paychecks to employees who work for someone else. Taxpayer operating company

oversimplifies its business interests beyond recognition. Under the terms of the casino operating Agreement, the casino owners may have been designated as employees of the casino owner. However the employees did not work for the casino owner; they worked for taxpayer operating company. Taxpayer operating company's business fortunes rose and fell with the interest of the casino and the employees who worked for that casino. Taxpayer operating company had an unconditional and immediate beneficial interest in the operation of this riverboat casino.

To characterize taxpayer operating company as a bemused and disinterested bystander is to ignore the authority that taxpayer operating company exercised over the casino and its employees and to ignore the interest that it had in the success or failure of the casino for which it was totally responsible.

### **FINDING**

Taxpayer's protest is respectfully denied.